IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE CHICKASAW NATION, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, and in their official capacities as members of the Board, WILMA B. LIEBMAN, Chairman, CRAIG BECKER, MARK G. PEARCE, AND BRIAN HAYES, Defendants.	Case No. 5:11-cv-506-W

DEFENDANTS NATIONAL LABOR RELATIONS BOARD ET AL.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION
AND
IN OPPOSITION TO THE NATION'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Cases-Cont'd: Page(s)

Cases-Cont'd: Page(s)

Cases-Cont'd: Page(s)

Statutes:

Statutes: Page(s)

Federal Rules of Civil Procedure:

Legislative Materials:

Code of Federal Regulations:

Miscellaneous:

INTRODUCTION

Over 70 years ago, in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), the Supreme Court held that United States district courts lack subject-matter jurisdiction to review, and therefore to enjoin, the processing of an unfair labor practice case by the National Labor Relations Board. Instead, a party seeking judicial review of an unfair labor practice case must first exhaust administrative remedies before the Board and, thereafter, may petition an appropriate court of appeals for review of a final Board order. Few principles are as firmly established in federal labor law as the *Myers* exhaustion rule. Indeed, this well-steeped precedent has been repeatedly followed by the courts of appeals, including the Tenth Circuit. *See Bd. of Trs. of Mem'l Hosp. v. NLRB*, 523 F.2d 845, 847 (10th Cir. 1975); *Boyles Galvanizing Co. of Colo. v. Waers*, 291 F.2d 791, 792 (10th Cir. 1961). The Plaintiff here, the Chickasaw Nation, is defending against an administrative unfair labor practice charge and complaint and can show no reason why its attempt to circumvent the settled exhaustion requirement should succeed where others have failed. Additionally, as is made clear in *Myers*, the Nation has failed to demonstrate irreparable harm, and has not satisfied any of the other requirements for injunctive relief. Accordingly, because the rule of *Myers* embraces this case, and because the Nation cannot point to any cognizable irreparable harm, Plaintiff's Motion for a Temporary Restraining Order and/or Preliminary Injunction should be denied, and the Complaint should be dismissed for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1).

THE PARTIES

The National Labor Relations Board ("NLRB" or "the Agency") is an independent federal agency created by Congress in 1935 to administer the National Labor Relations Act ("NLRA" or "the Act"). The Agency's primary duties are to prevent and remedy "unfair labor practices," as defined by Section 8 of the Act, 29 U.S.C. § 158 (2006), and to conduct union representation elections under Section 9, *id.* § 159. The NLRA, as amended, separates the Agency's prosecutorial and adjudicatory functions. Thus, Section 3(d) of the Act establishes the position of General Counsel and vests him with "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board." *Id.* § 153(d).[1] In addition, Section 3(a) of the Act, *id.* § 153(a), creates within the Agency a five-member Board, which is empowered by Section 10(a), *id.* § 160(a), to adjudicate unfair labor practice complaints brought by the General Counsel, and by Section 9, *id.* § 159, to process petitions for union representation elections and to certify the results of such elections.[2]

The Chickasaw Nation ("the Nation") is a federally recognized Indian tribe, *see* 75 Fed. Reg. 60,810 (Oct. 1, 2010), located in Oklahoma. (Compl. ¶ 1.) Pursuant to the

[1] The General Counsel has delegated this authority to the Agency's thirty-two Regional Directors, who exercise jurisdiction over defined areas of the country, subject to the General Counsel's ultimate supervision. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139 (1975) (citing 29 C.F.R. §§ 101.8, 102.10).

[2] For purposes of this brief, "the Board" will refer solely to the Section 3(a) collegial body. The administrative agency as an institutional whole will be referred to as "the NLRB" or "the Agency."

Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, the Nation conducts gaming activities on its lands though an establishment known as the WinStar World Casino. (*See* Compl. at 2.) WinStar World Casino is run through the Nation's Division of Commerce. (*See* Compl. ¶ 1.)

The Chickasaw Nation has executed multiple treaties with the United States. The most recent is the 1866 Treaty of Washington with the Choctaws and Chickasaws ("1866 Treaty"). (Pl.'s Br. Ex. 5.) Its terms declare "null and void" all prior "treaties and parts of treaties inconsistent herewith."[3] (*Id.* art. 51.) This currently applicable treaty does not bar access to tribal lands for federal government employees. Instead, the treaty explicitly excepts from its land exclusion language "officers, agents, and employees of the [United States] Government." (*Id.* art. 43.) In the 1866 Treaty, the Chickasaw Nation agrees to "such legislation as Congress and the President of the United States may deem necessary for the better administration of justice and the protection of the rights of person and property within the Indian Territory," (*id.* art. 7), and also agrees itself to refrain from enacting any law that is inconsistent with, *inter alia*, the laws of Congress (*id.* art. 8(4)).

FACTUAL BACKGROUND

On or about December 10, 2010, the International Brotherhood of Teamsters Local 886 ("Union") filed an unfair labor practice charge against WinStar World Casino

[3] During the Civil War, the Chickasaw Indians sided and made treaties with the Confederacy. Due to this alliance, the United States renounced its treaty with the Chickasaws. *Cohen's Handbook of Indian Law* 295 & n.711 (Nell Jessup Newton et al. eds., 2005). When the war ended, the Chickasaws signed a new treaty with the United States, the 1866 Treaty. It abolished slavery, authorized increased federal control, and

with the Tulsa Resident Office in NLRB Region 17, which subsequently was amended twice (Case No. 17-CA-25031). (Pl.'s Br. at 6 & Exs. 7, 8 & 10.) The second amended charge alleged that the Casino engaged in surveillance of employees' union activities, interrogated employees concerning union activities, and forbid union solicitation. (*Id.* Ex. 10.) The charge also alleged that the Casino disciplined an employee for engaging in union activity and threatened to fire employees for engaging in union activities. (*Id.*) Upon the filing of this unfair labor practice charge, the NLRB notified the Casino and initiated an investigation, as provided by Section 3(d) of the NLRA, 29 U.S.C. §3(d). (*See id.* Exs. 7, 8, & 10.) By letter dated January 12, 2011, counsel for the Casino responded, asserting that the Casino was a "tribal government enterprise" of the Nation and that the NLRA accordingly had no application to the Casino. (*Id.* Ex. 9.) The Casino conceded that it "gave incorrect advice concerning where a [union] card signing could occur," but denied that it engaged in interrogation, created an impression of surveillance, or maintained an unlawful prior approval rule. (*Id.*) Subsequently, by letter dated March 10, 2011, the Casino again asserted that the NLRA does not apply to the Casino because of tribal sovereignty. In the same letter, the Casino acknowledged that the no-solicitation rule in its handbook was "overbroad under the NLRA" but vigorously defended against all other assertions in the charge, contending that its actions comported with standards "under the National Labor Relations Act, and therefore, [are] not an unfair labor practice[s]." (*Id*. Ex. 11.) Thus, pursuant to the NLRA and Agency practice, the Casino,

---

only reaffirmed prior treaties to the extent that they were consistent with the newer treaty. *Id.*

and accordingly the Nation, have defended against the allegations of the unfair labor practice charge.

The Regional Director, on behalf of the Acting General Counsel of the Agency, issued an administrative complaint on March 31, 2011. (*Id.* Ex. 12.) The complaint alleges that WinStar World Casino violated Sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1), (3), based on conduct alleged in the charges. (*Id.* Ex. 12 ¶¶ 7 & 8.) The Casino filed an Answer with the NLRB on or around April 14, 2011, in which it denies that it is "an employer" or that it "engages in commerce" under the NLRA, *see* 29 U.S.C. §§152(2) & 152(6). The Answer states that "the employer of the employees at WinStar World Casino facility is the Chickasaw Nation[,]" and denies that the NLRB can assert jurisdiction over it. (NLRB Ex. 3.)

The Union subsequently filed a second charge, No. 17-CA-25121, against the WinStar World Casino on April 8, 2011, which it amended on May 3, 2011. (NLRB Exs. 1 & 2.) Therein, the Union alleged, *inter alia*, that the Casino threatened employees with the loss of benefits if they selected a Union for their bargaining representative, interrogated employees as to their union activities, and told its employees that supervisors were instructed to report all union activity to the Employer. (NLRB Ex. 2.) The Regional Director consolidated the two unfair labor practice cases (Nos. 17-CA-25031 & 17-CA-25121), issued an amended consolidated complaint, and scheduled an administrative hearing for June 1, 2011. (Pl.'s Br. Ex. 15.) Later, the NLRB voluntarily postponed the hearing until July 8, 2011.

Based on the foregoing facts, the Nation filed the instant Complaint against the NLRB, as well as a motion seeking a temporary restraining order and/or preliminary injunction. The first count of the Nation's Complaint alleges that the Agency's actions are *ultra vires*. (Compl. ¶¶ 48-49.) The second count alleges, *inter alia*, that application of NLRA protections to the Casino employees would violate the Chickasaw Nation's right of self-government because it would "deprive the Nation of its exclusive right to administer and enforce its [own internal labor] laws." (Compl. ¶¶ 54-55 & 58.) The third count alleges that the NLRA violates the Nation's rights under IGRA, and the final count alleges a violation of the NLRB's federal trust responsibility to the Chickasaw Nation.[4] (Compl. ¶¶ 64-65 & 70-75.) The Nation requests a declaratory judgment, an injunction, costs, and additional unspecified equitable relief. (*Id.* at 35.)

SUMMARY OF ARGUMENT

The first and—for the Agency—sole issue before this Court is whether the Nation's Casino can effectively bypass the NLRA's congressionally-mandated review procedures by launching a preemptive attack on the Agency's unfair labor practice proceeding in district court. To be clear, the instant case is not about whether the Agency may assert jurisdiction over a Casino operated by the Chickasaw Nation. That

---

[4] The federal trust responsibility requiring agencies to consult with tribes is not mandatory for independent agencies like the NLRB. Exec. Order No. 13175, 65 Fed. Reg. 218 (Nov. 6, 2000) (excluding independent agencies from the definition of agency); Office of the President, Guidance for Implementing E.O. 13175 (July 30, 2010) (adopting the definition of an agency from the 2000 Executive Order), *available at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf.

question—which has not yet been presented to or decided by the Board—will ultimately be decided by a federal appellate court.[5] The inquiry here is whether this Federal District Court will permit the Chickasaw Nation to circumvent congressionally-mandated judicial review procedures, and whether this Court will find that participating in the NLRB's administrative proceeding will cause the Nation irreparable harm in the face of binding precedent to the contrary.

The Agency submits that the Supreme Court's decision in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), as well as Tenth Circuit and out-of-circuit precedent, preclude this Court from exercising subject-matter jurisdiction over the instant case. These courts recognize that the NLRA's statutory review procedures in Section 10(f), 29 U.S.C. 160(f), grant exclusive review of NLRB proceedings to the circuit courts and deny district courts the authority to hear direct challenges to the commencement, prosecution, or adjudication of ongoing unfair labor practice proceedings. Section 10(f) strictly requires parties to unfair labor practice proceedings to exhaust their administrative and legal remedies before the Board and an appropriate court of appeals. This rule was applied less than one year ago by the District Court for the Western District of Michigan in *Little River Band of Ottawa Indians v. NLRB*, 747 F.Supp.2d 872, 886 (W.D. Mich. 2010), to dismiss a suit brought by another tribe alleging harm to its tribal

[5] As explained further below, if an employer or union found guilty of an unfair labor practice does not comply with the Board order, the Board must seek enforcement of that order pursuant to Section 10(e) of the NLRA 29 U.S.C. 160(e). Alternatively, pursuant to Section 10(f) of the NLRA (29 U.S.C. 160(f)), any party aggrieved by a final Board order can itself petition directly to a U.S. Court of Appeals for review before there can be any compulsory force to the Board's order.

sovereignty and seeking to enjoin a pending NLRB investigation of an unfair labor practice charge against the tribe's casino. Accordingly, the Nation's reliance on general jurisdictional statutes to establish subject-matter jurisdiction in this case is misplaced, the Nation's motion for injunctive relief should be denied, and the Complaint must be dismissed for lack of subject-matter jurisdiction.

ARGUMENT

"If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004) (citing *Mansfield C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)); *see Davoll v. Webb*, 194 F. 3d 1116, 1128 (10th Cir. 1999). When a defendant argues a lack of subject-matter jurisdiction, the plaintiff has the burden of proving jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Montoya v. Chao*, 296 F.3d 952, 955 (10th Cir. 2002). For the reasons set forth below, the Nation cannot sustain this burden, nor can it demonstrate irreparable harm or satisfy any of the other requirements for injunctive relief. Accordingly, the instant case should be dismissed.

I. WELL-ESTABLISHED LEGAL PRECEDENT DEPRIVES THIS COURT OF SUBJECT-MATTER JURISDICTION BECAUSE THE NLRA EXCLUSIVELY VESTS THE UNITED STATES COURTS OF APPEALS WITH THE AUTHORITY TO REVIEW "ALL QUESTIONS OF THE JURISDICTION OF THE BOARD" IN UNFAIR LABOR PRACTICE PROCEEDINGS.

The jurisdiction of federal district courts is limited, extending only to those subjects over which Congress has granted jurisdiction by statute. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986) (citing *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 173-80 (1803)); *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 511-12 (10th

Cir. 1994). The Nation asserts two separate bases for district court jurisdiction—general federal question jurisdiction under 28 U.S.C. § 1331, and jurisdiction over "all civil actions[] brought by any Indian tribe or Nation" that raise a federal question under 28 U.S.C. § 1362. (*See* Compl. ¶ 9.) Under the twin umbrellas of 28 U.S.C. 1331 and 1362, the Nation asserts that its claims "aris[e] under the United States Constitution, Treaties between the United States and the Chickasaw Nation, and federal statutory and common law." (*Id.*) However, as explained below, the Nation's reliance on statutes that provide general federal question jurisdiction is misplaced because the NLRA's exclusive review procedures divest this Court—and all district courts—of jurisdiction to consider the Nation's claims. Instead, the Nation's challenge to the Agency's jurisdiction over the underlying unfair labor practice matter must be presented to the Board in the first instance and thereafter may be raised in an appropriate court of appeals on judicial review of a final Board order.

A. CONGRESS DIVESTED ALL FEDERAL DISTRICT COURTS OF JURISDICTION OVER NLRA UNFAIR LABOR PROCEEDINGS OVER 70 YEARS AGO.

Congress did not grant federal district courts jurisdiction over NLRA administrative unfair labor practice proceedings. Rather, Congress gave the Board—and only the Board—exclusive authority to prevent "any person" from engaging in unfair labor practices, with review jurisdiction lodged exclusively in the circuit courts. 29 U.S.C. § 160(a) ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by

agreement, law, or otherwise[.]"); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959) ("It is essential to the administration of the Act that [jurisdictional] determinations be left in the first instance to the National Labor Relations Board."); *Oil, Chem. & Atomic Workers Int'l Union v. Ark. La. Gas Co.*, 332 F.2d 64, 66 (10th Cir. 1964).

Section 10(f) of the NLRA, 29 U.S.C. § 160(f), describes the procedure that aggrieved entities must follow to obtain judicial review in unfair labor practice cases. Pursuant to that provision, the *only* Agency decisions that are subject to judicial review are "final order[s] of the Board," and then *only* in an appropriate "United States court of appeals." *Id.* As the Supreme Court has noted, Congress designed Section 10(f) to give aggrieved parties "a full, expeditious, and *exclusive* method of review . . . after a final order is made." H.R. Rep. No. 74-1147, at 24 (1935) (emphasis added) (quoted in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 n. 5 (1938)). Because the Board's unfair labor practice decisions and orders are not self-enforcing, the Board can not force any charged party to take any form of remedial action, or to halt any conduct that it finds unlawful, prior to a Circuit Court enforcement of the final agency decision. Accordingly, "until such final order is made the party is not injured, and cannot be heard to complain." *Id.*

The Supreme Court's decision in *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), applies directly to the instant case and makes clear the preclusive effect that Section 10(f) has on efforts to enmesh district courts in disputes concerning Agency jurisdiction over pending unfair labor practice cases. In *Myers*, a putative NLRA

employer against whom an unfair labor practice complaint had issued sought to enjoin an administrative hearing that the NLRB had scheduled before a trial examiner. *Id.* at 46.[6] The company, Bethlehem Shipbuilding, also sought declaratory relief. *Id.* Similar to the Nation's position here, Bethlehem Shipbuilding argued that its operations fell outside the Act's lawful scope and that the NLRB had acted in excess of its jurisdiction. *Id.* at 47. Indeed, the company maintained that application of the NLRA to its activities would "violate the Federal Constitution." *Id.* at 46. Bethlehem Shipbuilding further argued that the holding of hearings "would result in irreparable damage to the corporation." *Id.* at 47-48. The district court found merit to these arguments and issued a preliminary injunction. *Id.* at 46. The First Circuit affirmed. *Id.* at 46-47.

On review, the Supreme Court reversed. In so doing, the Court emphatically rejected the proposition that district courts have the power to consider challenges to the NLRB's jurisdiction over pending unfair labor practice matters. In an opinion delivered by Justice Brandeis without dissent, the Court held that "[t]he District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair labor practice affecting commerce' has been vested by Congress in the Board and the Circuit Court of Appeals." *Id.* at 48. Because Board orders are not self-enforcing, the Court determined that the review procedures set forth in Section 10(f) provide "an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board." *Id.* Indeed, the *Myers* Court emphasized the comprehensive nature of appellate court review available at the conclusion of Agency

[6] "Trial examiners" are now referred to as "administrative law judges."

unfair labor practice cases: "'*[A]ll questions of the jurisdiction of the Board* and the regularity of its proceedings and *all questions of constitutional right or statutory authority* are open to examination by the court.'" *Id.* at 49 (emphasis added) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47 (1937)). Thus, because "the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals." *Id.* at 50. For these reasons, district court jurisdiction over matters arising in unfair labor practice cases was found to be incompatible with Congress's statutory design.[7]

Myers thus made clear the bedrock principle that decides this case, and that decided *Little River Band of Ottawa Indians*, 747 F.Supp.2d at 876—namely, that a charged party in an unfair labor practice case cannot bypass the NLRA's review provisions by challenging the Agency's jurisdiction in an ancillary district court lawsuit. Rather, pursuant to Section 10(f), an attack on Agency jurisdiction must be advanced in an appropriate court of appeals only after the NLRB's administrative proceedings have culminated in a final Board order. All defenses based on sovereignty and the laws of the

[7] There is no merit to the Nation's reliance on Freedom of Information Act cases where parties sought to enjoin Agency proceedings pending determination of their FOIA claims in federal district court. (Pl.'s Br. at 4.) The Nation relies on two cases to support its premise: *Maremont Corp. v. NLRB*, 1976 WL 4206, at *9 (W.D. Okla. 1976) (*Maremont I*), and *Sears, Roebuck and Co. v. NLRB*, 473 F.2d 91, 93 (D.C. Cir. 1973). Both cases rely on *Bannercraft Clothing Co., Inc. v. Renegotiation Bd.*, 466 F.2d 345 (D.C. Cir. 1972) (*Bannercraft I*), for the assertion that a district court has jurisdiction to enjoin an agency proceeding pending resolution of a Freedom of Information Act lawsuit. However, the Supreme Court reversed *Bannercraft I*. *See Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974) (*Bannercraft II*).

Tenth Circuit will by considered by the Board and reviewed be either the Tenth Circuit or the D.C. Circuit Court of Appeals. As concluded by the district court in *Little River Band of Ottawa Indians*, "[t]o the extent plaintiff's right to relief depends on resolution of a substantial question of federal law, namely, the NLRB's exercise of jurisdiction over it, that question is properly decided by the NLRB in the first instance, then the court of appeals. This Court lacks jurisdiction to prevent the NLRB from proceeding on the charge that plaintiff is engaged in an unfair labor practice." *Little River Band of Ottawa Indians*, 747 F.Supp.2d at 890.[8]

B. THE FEDERAL APPELLATE COURTS ARE IN AGREEMENT THAT UNFAIR LABOR PRACTICE PROCEEDINGS MAY NOT BE ENJOINED BY FEDERAL DISTRICT COURTS.

Since *Myers* was decided, the Supreme Court, and this circuit and others, repeatedly have rejected attempts by federal district courts to enjoin the NLRB from investigating, litigating, or adjudicating unfair labor practice cases. *See Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 56-57 (1938); *Boyles Galvanizing Co. of Colo. v. Waers*, 291 F.2d 791, 792 (10th Cir. 1961); *see also Amerco v. NLRB*, 458 F.3d 883, 884 (9th Cir. 2006); *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002); *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 107 (3d Cir. 1979); *J.P. Stevens Emps. Educ. Comm. v. NLRB*, 582 F.2d 326, 328 (4th Cir.

[8] The Little River Band of Ottawa Indians did not appeal the district court decision to the Sixth Circuit Court of Appeals. Instead, after the district court dismissed its lawsuit, the Band challenged the Board's jurisdiction before the Board. The Agency proceeding in *Little River Band of Ottawa Indians* has been briefed and remains pending before the Board for decision.

1978); *United Aircraft Corp. v. McCulloch*, 365 F.2d 960, 960 (D.C. Cir. 1966); *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 671 (5th Cir. 1966).

Two cases are particularly notable. One is *N. Natural Gas Co. v. Trans Pac. Oil Corp.*, 529 F.3d 1248, 1251 (10th Cir. 2008), a recent and binding decision of the Tenth Circuit applying the *Myers* rule that a district court lacks power to enjoin an agency's pending hearings. The Tenth Circuit explicitly recited the *Myers* rationale that to conclude otherwise would "in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance." *Id.* (citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 (1938)). The Circuit thus held that the district court properly determined that it lacked subject matter jurisdiction to interfere with an ongoing proceeding before the Federal Energy Regulatory Commission. *Id.* at 1252.

Another instructive case in this long line of authorities is *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977). In *Grutka*, the Catholic Church sought to have a district court enjoin simultaneous representation and unfair labor practice cases involving a parochial school on the ground that the Agency lacked jurisdiction. Specifically, the Church argued that application of the NLRA to its church-operated parochial school would violate the Religion Clauses of the First Amendment. However, like the Supreme Court in *Myers*, the Seventh Circuit rejected the Church's effort to establish district court subject-matter jurisdiction, concluding that "[t]he constitutional allegations of this complaint do not confer jurisdiction upon the district

court because the statutory review procedures are fully adequate to protect the plaintiff's constitutional rights." *Id.* at 9.

After denying certiorari in *Grutka*, the Supreme Court granted certiorari in a related consolidated NLRB case to consider the merits of the Church's same First Amendment argument, but only after the issue had been addressed first by the Board in the underlying unfair labor practice proceedings and then by the Seventh Circuit on judicial review pursuant to Section 10(f). *See NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), *aff'g* 559 F.2d 1112 (7th Cir. 1977), *denying enforcement to* 224 N.L.R.B. 1221, *and Diocese of Fort Wayne-South Bend*, 224 N.L.R.B. 1226 (1976). The Supreme Court there ruled in favor of the Church, concluding that "Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions." *Id.* at 506. Thus, the Supreme Court's dispositions of *Grutka* and *Catholic Bishop* show that even a *meritorious* constitutionally-based claim of jurisdictional overreach by the Agency does not alter the *Myers* exhaustion rule. *See also Goethe House New York, German Cultural Center v. NLRB*, 869 F.2d 75 (2d Cir. 1989) (dismissing for lack of subject-matter jurisdiction, a suit where an employer, substantially regulated by the German Government, sought injunctive relief from an NLRB election proceeding). Accordingly, the Nation's claim of jurisdictional overreach in the pending underlying unfair labor practice case fails to establish subject-matter jurisdiction.

In sum, the Nation's effort to secure injunctive and declaratory relief runs headlong into binding and persuasive authorities, which consistently follow *Myers* and hold that Section 10(f) of the NLRA precludes district courts from exercising subject-

matter jurisdiction over challenges to pending Agency unfair labor practice proceedings. The remedies sought by the Nation are contrary to well-established law, and therefore fall outside this Court's power to grant.[9]

II. BECAUSE NEITHER THE GENERAL JURISDICTIONAL STATUTES NOR THE INAPPOSITE CASES CITED BY THE NATION SUPERSEDE THE NLRA'S SPECIFIC REVIEW PROCEDURES, THE NATION HAS FAILED TO PROVE THAT SUBJECT-MATTER JURISDICTION EXISTS.

In the absence of a specific statutory grant of jurisdiction, *Myers* and its progeny compel the conclusion that the NLRA's review provisions—in particular, Section 10(f)—divest this Court of jurisdiction to hear the instant case. The Nation seeks to satisfy its burden of proving district court jurisdiction by relying on two general jurisdictional statutes, 28 U.S.C. §§ 1331 and 1362, and invoking for its cause of action the Supremacy Clause of the Constitution, the IGRA, federal common law, and treaties to satisfy those jurisdictional statutes. (Compl. ¶ 9.) In contrast to Section 10(f) of the NLRA, neither Section 1331 nor Section 1362 addresses jurisdiction over unfair labor practice matters. Thus, as shown below, these generalized provisions cannot override Section 10(f)'s

[9] The Supreme Court has recognized only two extremely narrow exceptions to the general premise that federal district courts lack Section 1331 jurisdiction to review proceedings of the Agency. The two exceptions arose in narrow and extraordinary cases, and neither is applicable here. "Both of these cases involved exceptional factual situations of such urgency as to warrant the overriding of the congressional policy against such immediate review" in federal district court. *Greensboro Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28, 31 (4th Cir. 1967). One exception is limited to cases raising questions of national interest with international implications. *See McCulloch v. Sociedad Nacional*, 372 U.S. 10 (1963). The other exception is limited to cases where the Board clearly violates a mandatory provision of the Act and there are no other means of remedying the violation. *See Leedom v. Kyne*, 358 U.S. 184 (1958).

specific grant of exclusive review to the courts of appeals, and therefore fail to establish the existence of subject-matter jurisdiction in this case.

Section 1331 of title 28 gives district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Section 1362 of the same title similarly provides district courts with "original jurisdiction of all civil actions . . . aris[ing] under the Constitution, laws, or treaties of the United States" when brought by a federally recognized Indian tribe or nation. As the Supreme Court has observed, "Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U.S.C. § 1331, the general federal question jurisdictional statute." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561 n.10 (1983); *see also Oneida Indian Nation v. Cnty. of Oneida*, 464 F.2d 916, 920 n.4 (2d Cir. 1972) (Friendly, J.) (noting that the purpose of section 1362 was to overrule a 1964 Ninth Circuit case "involv[ing] a claim that would have been assertable under § 1331 but for the requirement of jurisdictional amount"), *rev'd on other grounds*, 414 U.S. 661 (1974). Since 1980, when Congress repealed section 1331's amount-in-controversy requirement, *see* Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369, the jurisdictional scope of section 1362 has been, at least on its face, coextensive with section 1331 in suits brought by Indian tribes.

"What is striking about this most unremarkable statute [i.e., section 1362] is its similarity to any number of other grants of jurisdiction to district courts to hear federal-question claims." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 783 (1991).

Indeed, courts, including the Tenth Circuit, have noticed this similarity and have classified both sections 1331 and 1362 as general jurisdictional statutes. *See Miami Tribe v. United States*, 198 Fed. Appx. 686, 691 (10th Cir. 2006) (sections 1331 and 1362); *S. Delta Water Agency v. United States*, 767 F.2d 531, 543 (9th Cir. 1985) (section 1362); *Cayuga Indian Nation v. Cuomo*, 1999 WL 509442, at *4 (N.D.N.Y. 1999) (same); *Poarch Nation of Creek Indians v. Alabama*, 776 F. Supp. 550, 555 (S.D. Ala. 1991) (same).

General jurisdictional statutes like sections 1331 and 1362 provide no exception to the long-settled limitations on judicial authority over NLRB proceedings. When Congress elects to withhold jurisdiction from the federal district courts, they are divested of federal-question jurisdiction because "[a] general statute does not confer jurisdiction when an applicable regulatory statute precludes it." *Bd. of Trs. of Mem'l Hosp. v. NLRB*, 523 F.2d 845, 846 (10th Cir. 1975). This principle asserted by the Tenth Circuit in *Board of Trustees of Memorial Hospital* has been reflected across the federal appellate courts. *See Owners-Operators Indep. Drivers Ass'n of Am., Inc. v. Skinner*, 931 F.2d 582, 589 (9th Cir. 1991) ("Specific grants of exclusive jurisdiction to the courts of appeals override general grants of jurisdiction to the district courts."); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) ("The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts."); *Louisville & Nashville R.R. Co. v. Donovan*, 713 F.2d 1243, 1245 (6th Cir. 1983) (rejecting reliance on Sections 1331, 1337, and 1361 because "when Congress designates a forum for judicial review of administrative action, that forum is

exclusive"); *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1997) ("[Section] 1331 is a general federal-question statute, which gives the district courts original jurisdiction unless a specific statute assigns jurisdiction elsewhere."); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998) (same). Such preclusion of jurisdiction was also applied by the district court in *Little River Band of Ottawa Indians*, where the court rejected the Band's reliance on both Sections 1331 and 1362 as bases for the court's jurisdiction to enjoin an NLRB proceeding. *Little River Band of Ottawa Indians*, 747 F.Supp. 2d at 882-84. By this same reasoning, the Nation's reliance on these general jurisdictional statutes cannot surmount the NLRA's specific review procedures, which exclusively vest the power of judicial review over NLRB unfair labor practice proceedings in a "specially designated forum"—that is, the courts of appeals.

The Nation's argument that this case arises under the Supremacy Clause falls flat. The Supremacy Clause grants federal law and treaties a superior status to state law. U.S. Const. art. 4, cl. II; *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). This case involves the relationship between federal and tribal law. The Supremacy Clause does not speak to that issue. The Nation has not and can not find case law to support their reliance upon the Supremacy Clause in these circumstances.

The Nation also gains no support from its citation to *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997), a case in which subject matter jurisdiction was undisputed. (Compl. ¶ 9.) There, several Pueblo tribes sought a declaration that tribal-state gaming compacts were valid and in effect under IGRA, after the New Mexico

Supreme Court had determined that the governor lacked authority to enter into the compacts. *Pueblo of Santa Ana*, 104 F.3d at 1557. The court noted that it would need to apply both state and federal law, and that its interpretation of provisions of the IGRA raised a federal question, giving it "the *power* to determine whether a Tribal-State compact is valid." *Id.*

Here, of course, the validity of a tribal-state compact is not at issue. The IGRA regulates tribal gaming activities on Indian lands. It does not address the force of the NLRA over such gaming enterprises, the issue with which the Board is concerned. *See San Manuel Indian Bingo & Casino*, 475 F.3d 1306, 1317 (D.C. Cir. 2007) (Congress did not "enact[] a comprehensive scheme governing labor relations at Indian casinos" and there is "no indication that Congress intended to limit the scope of the NLRA when it enacted IGRA").[10] Importantly, all defenses to application of the Agency's jurisdiction over the Nation, including reliance upon the IGRA, need to be made to the Board in the first instance, and then, upon an appropriate appeal, they will be "open to examination by the [appellate] court," *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49 (1938).

The Nation further fails to advance its case by its reliance on federal common law under *Nat'l Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 850-53 (1985) (Compl.

[10] Moreover, the out-of-circuit cases cited by Nation are inapposite (Compl. ¶ 9(b)). The first addresses the relationship between IGRA and state law and the second arises squarely under IGRA and its regulations. *See Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544-45, 547 (8th Cir. 1996) (holding that IGRA completely preempts state laws regulating gaming on Indian lands); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 63 F.3d 1030, 1046-67 (11th Cir. 1995) (alleging that a tribe violated its duty pursuant to IGRA to process applications for gaming licenses in good faith).

¶ 9), which is inapposite. In *National Farmers Union*, the Supreme Court required the plaintiff school district and its insurer to exhaust tribal court remedies before seeking in federal court to enjoin an injured schoolboy from executing on a default judgment granted against the school district in Indian tribal court. *Id.* at 847, 855-56. The Supreme Court granted certiorari to adjudicate whether the district court had subject matter jurisdiction to issue the injunction, and held that it did not. The Court commented that the "existence and extent" of the tribal court's jurisdiction would require a careful examination of tribal sovereignty and the extent to which that sovereignty has been altered, divested, or diminished, but the analysis should be conducted "in the first instance in the Tribal Court itself." *Id.* at 856. Because the Court found that the district court lacked subject matter jurisdiction to first determine the tribal sovereignty issue, this case fails to support the Nation's jurisdictional claim here.

Finally, the Nation contends that the federal district court may assert jurisdiction because this case arises under treaties between the United States and the Chickasaw Nation. (Compl. ¶ 9.) As with its claim under the IGRA, however, the Nation's reliance on treaties is a defense to application of the NLRA to its Casino. As a basis for this Court's jurisdiction, the treaties are no more availing than was the U.S. Constitution to the Catholic Church in *Grutka v. Barbour*, 549 F.2d 5, 9 (7th Cir. 1977). That is, *Myers* and its progeny require that the IGRA and the Nation's treaties be asserted pursuant to the procedures codified under the NLRA, which provides for immediate judicial review, if necessary, after adjudication before the Board. *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1203-04 (10th Cir. 2002), on which the Nation relies (Pl. Br. at 4), is inapposite, as

the tribe's cause of action there was brought directly under an Executive Order and Congressional Act, in order to establish its rights to fish, hunt, and gather on land. No other statute precluding 1331 jurisdiction, and requiring administrative exhaustion, was applicable there.

In sum, the Nation attempts to convince this Court that Sections 1331 and 1362 would produce an unprecedented and expansive exception to the Circuit Courts' exclusive power to review unfair labor practices proceedings, as established by the settled strictures of Section 10(f). If the Nation was correct, all 562 federally-recognized Indian tribes would be entitled to march into district court to preempt the General Counsel from prosecuting, and the Board from adjudicating, properly filed unfair labor practice charges so long as they point to IGRA, make a claim of injury to tribal sovereignty, or point to any possibly relevant Treaty. Such a drastic and extraordinary result is not supported by the text of Section 1331 or 1362, by cases interpreting their scope, or indeed by logic. Accordingly, as was the case of the Little River Band of Ottawa Indians, the Nation has failed to carry its burden of establishing the existence of subject-matter jurisdiction under these provisions.

III. BINDING SUPREME COURT PRECEDENT HOLDS THAT PARTICIPATION IN AN ADMINISTRATIVE PROCEEDING BEFORE THE NLRB DOES NOT CONSTITUTE IRREPARABLE HARM, NOR DOES THE CHICKASAW NATION MEET ANY OTHER CRITERIA FOR PRELIMINARY INJUNCTIVE RELIEF.

In *Myers*, the Supreme Court concluded that participation in NLRB administrative proceedings, before securing appellate court review pursuant to NLRA Section 10(f), does not constitute irreparable harm. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S.

41, 49-50 (1938). Bethlehem Shipbuilding contended that its attempt to evade the requirement of administrative exhaustion was permissible because a Board proceeding would violate its Constitutional rights, and because the administrative hearing would result in costly litigation expenses. *Id.* at 47, 50. The Court firmly rejected this attempt to graft an irreparable harm exception onto the administrative exhaustion principle:

> Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of trial to establish the fact.

Id. at 51-52.

The Nation, echoing the company in *Myers*, claims that it cannot be required to follow this long-settled rule of no district court jurisdiction because exhaustion of administrative remedies would cause the Nation to suffer irreparable harm. Whereas the plaintiff in *Myers* complained of irreparable damage, *inter alia*, to its constitutional rights, the assertedly irreparable harm here is injury "to the Nation's Treaty rights and inherent sovereign authority." (Pl. Br. at 23.) But nothing in *Myers* indicates that the Court would have reached a different result had a different *kind* of "irreparable harm" been asserted. Rather, the Court explicitly recognized that the sufferance of various harms—whether real or imagined, quantifiable or abstract—is an unavoidable consequence of any adjudicatory process. The harm here is no greater than that asserted by the Catholic Church under the Religion Clause of the First Amendment in *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977). It is an understatement

to say that, under the First Amendment, the federal government is permitted less regulatory authority over the Catholic Church than it has over Tribes. And yet, the NLRB's long-standing and congressionally-mandated administrative processes were held to impose no irreparable harm on Catholic Church. *Id.* at 9 n.7; *see also Goethe House New York, German Cultural Center v. NLRB*, 869 F.2d 75 (2d Cir. 1989) (NLRB administrative requirements do not impose irreparable harm on German Cultural Center even though employer is substantially regulated by the German Government).

Furthermore, although the NLRB acknowledges and respects the Nation's interest in protecting its tribal sovereignty, for at least one crucial reason, the abstract "harm" complained of by the Nation is minimal at best. It cannot be overemphasized: NLRB proceedings are not coercive, and Board orders are not self-enforcing. The Agency cannot require the Nation to modify its conduct in the running of its Casino unless and until a court of appeals determines the jurisdictional issue against the Nation and grants enforcement of a Board order. *See Myers*, 303 U.S. at 48; *Little River Band of Ottawa Indians v. NLRB*, 747 F.Supp.2d 872, 890 (W.D. Mich. 2010) ("plaintiff's asserted basis for jurisdiction, *i.e.*, its alleged injury to tribal sovereignty caused by unfair labor practice proceedings, is fundamentally at odds with Congress' determination that no injury occurs until after the Board issues a final order, at which time circuit court review is available pursuant to § 10(f)"). At this point in the instant NLRB proceedings, the Agency can only urge the Nation to present its arguments why it should not be held liable for violating the NLRA – arguments that the Nation already made when it responded to the Region during the Region's initial investigation. Indeed, to further make its sovereignty

defenses to the NLRB's jurisdiction, the Nation need only follow the course charted in *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055 (2004), *further proceedings*, 345 N.L.R.B. 1047 (2005), *enforced*, 475 F.3d 1306 (D.C. Cir. 2007), and file a motion to dismiss with the Board on jurisdictional grounds.[11] Even if the Board should reject the Nation's objection to NLRB jurisdiction over the Casino operators, the Nation will have an adequate opportunity to present those very same arguments to an appropriate circuit court. And, in that event, whether the circuit court sides with the Nation or the NLRB, that decision—unless overturned by the Supreme Court—will authoritatively settle in that circuit the jurisdictional issue raised by the Nation. *See Catholic Bishop v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979). This relatively modest

[11] In that case, the San Manuel Band of Serrano Mission Indians, a California tribe, argued on Section 10(f) review of a final Board order in an unfair labor practice case that the Board lacked jurisdiction over a casino wholly owned and operated by the tribe on its reservation. *San Manuel Indian Bingo & Casino*, 475 F. 3d at 1307-08. The San Manuel Band chose to proceed with its arguments in the D.C. Circuit pursuant to Section 10(f), 29 U.S.C. § 160(f), which permits aggrieved parties in NLRB proceedings to file a petition for review of a final Board order in a circuit (i) where the party resides or transacts business or the unfair labor practice occurred (the Ninth Circuit for the San Manuel Band), or (ii) in the D.C. Circuit. *Id.* at 1309. By contrast, should the Board initiate appellate review in a circuit court, it may only file a petition for enforcement of its order in a circuit where the unfair labor practice occurred or the party resides or transacts business. *See* 29 U.S.C. § 160(e).

The San Manuel Band's arguments presented in opposition to the Board's jurisdiction were similar to those made here, and the issues were considered at length by both the Board and the D.C. Circuit before the San Manuel Band was directed by the Court to alter its management of the casino to satisfy the requirements of the NLRA. The Chickasaw Nation can point to no reason why its assertion of tribal sovereignty is entitled to a different, earlier, and statutorily precluded form of federal judicial review that would deny the Board the initial opportunity to decide its own jurisdiction upon evidence and legal argument presented in an agency-level adversarial proceeding, as dictated by Congress. Further, the Congressionally-mandated review process is particularly

procedure, though undesirable to the Nation, cannot reasonably be characterized as causing "injury," let alone "irreparable injury," to tribal sovereignty warranting enjoining the Board from initially deciding its own jurisdiction. *See Myers*, 303 U.S. at 48 n.5 (until the circuit court issues an order, an aggrieved person is definitively "not injured and cannot be heard to complain."); *Stiefel, Nicolaus & Co. v. Woolsey & Co.*, 43 F.3d 1483 at *2 (10th Cir. 1994) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980)) ("The Supreme Court has recently reiterated that '[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'").

In short, irreparable injury does not flow from the Supreme Court's requirement that the Nation participate in Agency proceedings prior to seeking judicial review. This principle has long been made clear, most notably in *Myers* itself and in the Tenth Circuit. *Myers*, 303 U.S. at 51–52; *W. Shoshone Bus. Council v. Babbitt*, 1 F.3d 1052, 1058–59 n.4 (10th Cir. 1993) ("plaintiffs cannot claim the administrative process is inadequate until they attempt to invoke it"); *Little River Band of Ottawa Indians v. NLRB*, 747 F.Supp.2d 872, 889-90 (W.D. Mich. 2010) (relying on *Myers* to reject Little River Band of Ottawa Indians' argument that NLRB "proceeding itself, not the outcome or the enforcement of any final order of a circuit court of appeals . . . will cause [the Band] harm"); *Detroit Newspaper Agency v. NLRB*, 286 F.3d 391, 401 (6th Cir. 2002) (district court erred in finding subject-matter jurisdiction existed on the basis that the employers would suffer harm by having to litigate the matter as a basis "without foundation in the

---

important for cases like this one that require the Board to adjudicate an asserted issue of first impression.

jurisprudence"); *Sears, Roebuck & Co. v. Solien*, 450 F.2d 353 (8th Cir. 1971) (mere assertion of illegality of practice of NLRB regional director, when full NLRB and appellate review is available, was insufficient to grant federal district court subject matter jurisdiction in face of doctrine of exhaustion of administrative remedies).

The harm suffered by the Nation is "irreparable" only if the Nation has sovereign immunity from federal adjudicatory proceedings. But tribes do not have sovereign immunity from suit by the United States or its agencies. *See Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) ("Tribal sovereign immunity does not bar suits by the United States"); *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987); William C. Canby, Jr., *American Indian Law* 88 (3d ed. 1998). Those harms are the inevitable consequence of litigation, from which the Nation is not immune, and are wholly insufficient to merit a departure from the rule of *Myers*.

The cases cited by the Nation provide no support for its claim that NLRB jurisdiction would impose "irreparable injury to the tribe's inherent sovereign authority[,]" (Pl.'s Br. at 24), because the cases involve state actors – not federal actors like the NLRB. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 154 (1980) ("it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States"). Thus, the cases cited by the Nation yield no insight into the case at bar. *Cf.* Pl.'s Br. at 24 (citing *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (State of Kansas attempted to enforce state gambling laws on Tribal lands); *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (State of Kansas

attempted to impose state motor vehicle registrations and titles on Tribal land); *Seneca-Cayuga Tribe v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989) (State of Oklahoma attempt to enjoin operation of bingo operation of Indian trust land); *Winnebago Tribe of Neb. v. Stovall*, 21 F. Supp.2d 1226 (D. Kan. 2002), aff'd, 341 F.3d 1202, 1233 (10th Cir. 2003) (State of Kansas attempted to enforce state fuel taxes on inter-tribal fuel sales)). [12]

In addition to its failure to demonstrate irreparable harm, the Nation also cannot meet any of the other criteria necessary for a preliminary injunction -- a likelihood of success on the merits, that the balance of equities tips in the movant's favor, and that the injunction is in the public interest. *See Little v. Jones*, 607 F.3d 1245, 1251 (10th Cir. 2010). The Nation can only be successful in this matter if this Court has subject matter jurisdiction to hear the matter and grant the requested relief. As shown at length above, however, the Court does not have such jurisdiction. The Nation, therefore, has no likelihood of success. The balance of equities factor is intertwined with the public interest consideration. The NLRB was created and empowered by Congress to initially adjudicate and where appropriate remedy unlawful labor practices which otherwise would interfere with interstate commerce. 29 U.S.C. §§ 151 & 160; *see U.A.W. Local 283 v. Scofield*, 382 U.S. 205, 220 (1965); *Vaca v. Sipes*, 386 U.S. 171, 182-83 n.8 (1967) ("The public interest in effectuating the polices of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in

[12] Similarly, the Nation cannot anchor their claim to a case where a private party sued an Indian Nation on a contract claim. Of course, private parties lack any type of sovereign status. (*Cf.* Pl.'s Br. at 23-24) (citing *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163, 1172).

fashioning unfair labor practice remedies."). Any injunction of the Board's consideration of alleged unfair labor practices patently would frustrate Congress' purposes, while requiring the Nation to exhaust administrative remedies prior to securing circuit court review will result in no cognizable irreparable harm. Accordingly, the balance of equities favors denial of injunctive relief.

IV. THIS COURT MUST ADHERE TO THE CONGRESSIONALLY-MANDATED REVIEW PROCESS AND PERMIT THE BOARD TO ADJUDICATE THIS CASE IN THE FIRST INSTANCE.

In light of the foregoing, this Court need not and should not consider the merits of the Nation's contentions regarding the Agency's lack of jurisdiction over the Tribal Casino. The issue of whether the Board can exert jurisdiction over the Casino in light of the specific treaty and IGRA rights discussed by the Nation properly must be presented to and determined by the Board in the first instance. For that reason, and since the Board has not yet had the opportunity to decide the issues raised by the administrative complaint, the Board cannot now pre-judge the issue and the Nation's sovereignty arguments, as would be required in order for the Agency to take a formal position here on its jurisdiction over the Nation's Casino. Thus, in order to enjoin the unfair labor practice proceeding, this Court would be faced with the unfortunate task of adjudicating the Agency's jurisdiction over the Nation's Casino, an issue of first impression for the Board, before the Board has an opportunity to make its own determination under the facts of this case.

Moreover, the existence of Agency jurisdiction in the underlying unfair labor practice case is hardly as open-and-shut as the Nation would have this Court conclude. As the Tenth Circuit noted as recently as 2002, it has yet to adjudicate whether the NLRA applies to Indian tribes: "[w]e begin by noting what the district court also took pains to point out, namely, that the general applicability of federal labor law is not at issue. Furthermore, the Pueblo does not challenge the supremacy of federal law." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1191 (10th Cir. 2002) (internal citations omitted) (holding that the NLRA does not preclude the Pueblo from enacting a right-to-work ordinance covering on-reservation employers similar to those permitted by the NLRA to be enacted by the several states); *see also NLRB v. Fortune Bay Resort Casino*, 688 F. Supp. 2d 858, 862, 869 (D. Minn. 2010) (enforcing a subpoena duces tecum against Bois Forte Band of Chippewa Indians' casino because even if presumptions favorable to tribal exemption from federal law are applied, it was at best "unclear . . . whether the NLRA [adversely] affects rights specifically reserved to the Band").

The Supreme Court "has consistently declared that in passing the NLRA, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963). The language of §2(2) of the Act "vests jurisdiction in the Board over any 'employer' doing business in this country save those Congress excepted with careful particularity." *State Bank of India v. NLRB*, 808 F.2d 526, 531 (7th Cir. 1986). Under the *Tuscarora/Coeur d'Alene* framework upon which the Board has previously relied, a federal law of general applicability covers Indian tribes unless "(1)

the law touches exclusive rights of self-government in purely intramural matters; (2) the application of the law would abrogate treaty rights; or (3) there is proof in the statutory language or legislative history that Congress did not intend the law to apply to Indian tribes." *San Manuel Indian Bingo & Casino*, 341 N.L.R.B. 1055, 1059 (2004).[13] The principles of *Tuscarora* and *Coeur d'Alene* have been widely adopted to sustain the application of a number of employment and civil rights statutes. *See, e.g., Fla. Paraplegic Assn. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1129-1130 (11th Cir. 1999) (ADA); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 177 (2d Cir. 1996) (OSHA); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) (ERISA); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113, 1115 (9th Cir. 1985) (OSHA).

The Tenth Circuit has relied upon the *Tuscarora/Coeur d'Alene* framework. In *Nero v. Cherokee Nation of Okla.*, 892 F.2d 1457 (10th Cir. 1989) -- a case decided *after* the *EEOC v. Cherokee Nation* and *Navajo Forest Products Indus.* cases upon which the Nation heavily relies[14] -- descendants of slaves owned by the Cherokee Indian Nation and freed by a treaty brought suit under 42 U.S.C. §1981 (1982) and 42 U.S.C. §2000d (1982), alleging violations of their rights to vote in tribal elections and to participate in federal Indian benefit programs. *Id.* at 1462. Citing *Tuscarora*, the Tenth Circuit identified both federal statutes as laws of general applicability and considered whether the *Coeur d'Alene* exceptions applied. *Id.* 1462-63. It concluded that both statutes

[13] *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960); *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir.1985).

violated the "self-governance in purely intramural matters" prong of *Coeur d'Alene* because a tribe's right to "define its own membership for tribal purposes," even if it meant excluding former slaves, "has long been recognized as central to [a tribe's] existence as an independent political community." *Id.* at 1463. To the extent that the Tenth Circuit's decision in *Dobbs v. Anthem Blue Cross and Blue Shield*, 600 F.3d 1275 (10th Cir. 2010), recognizes that "[a]pplying certain federal regulatory schemes to Indian tribes would impinge upon their sovereignty," *id.* at 1284, the same court explained that federal statutes of general applicability apply to tribal governments when they exercise property rights, *id.*, such as in *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 556 (10th Cir. 1986), rather than their authority as a sovereign. The Tenth Circuit reiterated the distinction in *NLRB v. Pueblo of San Juan*, where it found *Tuscarora* applicable to situations where tribes act "in a proprietary capacity such as that of employer or landowner." *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1199 (10th Cir. 2002).

Moreover, as the D.C. Circuit stated in *San Manuel*, "the Supreme Court's decisions reflect an earnest concern for maintaining tribal sovereignty, but they also recognize that tribal governments engage in a varied range of activities many of which are not activities we normally associate with governance." *San Manuel Indian Bingo & Casino*, 475 F.3d 1306, 1314 (D.C. Cir. 2007). The Court concluded that "tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a commercial capacity without legal constraint." *Id.* In the case at bar, while the Nation has asserted

---

[14] *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989); *Donovan v. Navajo Forest Products Indus.*, 692 F.2d 709 (10th Cir. 1982).

that applicable precedent precludes application of the NLRA to its Casino, the question is far from clear. Indeed, to the extent that any treaty rights asserted by the Nation would preclude the application of the NLRA to the Nation's casinos, such concerns fall within the *San Manuel* framework followed by the Board in determining whether to assert jurisdiction over a tribal entity, and thus will be addressed by the Board and a reviewing appellate court at the appropriate time.[15]

CONCLUSION

In the end, "neither the National Labor Relations Act itself, nor any authoritative legislative history, . . . nor any other Supreme Court decision, either commands or authorizes the delay inherent in District Court review" of NLRB unfair labor practice cases. *Blue Cross & Blue Shield of Mich. v. NLRB*, 609 F.2d 240, 244 (6th Cir. 1979). To the contrary, *Myers* commands lower federal courts to scrupulously enforce the Act's exhaustion principles by dismissing preemptive actions like this for lack of subject-matter jurisdiction. Accordingly, the Nation's attempt to interfere with the pending unfair labor practice case by asking this Court for equitable relief in a case over which it lacks jurisdiction is both inappropriate and contrary to law. It follows that the Nation's motion for injunctive relief should be denied and its Complaint must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

[15] Issues regarding union access to tribal lands also must await the Board's determination of jurisdiction and the underlying unfair labor practice, with appellate court review of those decisions. The Nation's concerns about whether it will need to provide union officials with access to a list of employee names and addresses and access to bulletin boards is premature, as the Board cannot require the Nation to provide information or access to union officials at this time. (*See* Pl.'s Br. Ex. 15.)

Respectfully submitted,

CHARLES T. HOSKIN
Attorney
(918) 581-7946
Charles.Hoskin@nlrb.gov

National Labor Relations Board
Region 17 – Resident Office
Tulsa Resident Office
224 South Boulder Avenue
Room 318
Tulsa, OK 74103-3027

ERIC G. MOSKOWITZ
Assistant General Counsel
(202) 273-2931
Eric.Moskowitz@nlrb.gov

NANCY E. KESSLER PLATT
Supervisory Attorney
(202) 273-2937
Nancy.Platt@nlrb.gov

s/ Nina Schichor
NINA SCHICHOR
Attorney
(202) 273-7957
Nina.Schichor@nlrb.gov

National Labor Relations Board
Special Litigation Branch
1099 14th Street, NW
Washington, DC 20570

Dated: June 10, 2011